No. 78-1793

In the Supreme Court of the United States

OCTOBER TERM, 1978

WINFIELD L. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed the judgment of the district court without opinion (Pet. App. A).

JURISDICTION

The amended judgment of the court of appeals was entered on February 23, 1979. A petition for rehearing was denied on April 30, 1979. The petition for a writ of certiorari was filed on May 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court may consider the defendant's failure to cooperate with the government as a relevant factor in imposing sentence.

STATEMENT

Petitioner was indicted in the United States District Court for the District of Columbia on one count of conspiracy to distribute heroin and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846, and on four substantive counts of unlawful use of a communication facility to distribute heroin, in violation of 21 U.S.C. 843(b). After pleading guilty to two of the substantive counts, petitioner was sentenced to two consecutive terms of one to four years' imprisonment, to be followed by a special parole term of three years.[1] The court of appeals affirmed (Pet. App. 1a-2a).[2] A petition for rehearing en banc was denied, with two judges submitting separate statements (Pet. App. 3a-23a).

At petitioner's sentencing hearing, the prosecutor argued that the court should impose consecutive sentences of 16 to 48 months' imprisonment on each count to which petitioner pleaded guilty (Tr. 11).[3] The prosecutor pointed out that petitioner had previously been convicted for bank robbery, was currently unemployed, and had made large profits as a drug dealer (Tr. 14-16). The prosecutor also told the court that, while petitioner had cooperated to some extent with the government, he had refused to provide information about others involved in the heroin

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[1]Petitioner had previously pleaded guilty to the conspiracy charge, but his conviction on that plea was subsequently set aside by the court of appeals due to an infraction of Fed. R. Crim. P. 11 (*United States* v. *Roberts*, 570 F. 2d 999 (D.C. Cir. 1977)). On remand, petitioner pleaded guilty to the two substantive counts under 21 U.S.C. 843(b).

[2]The court's judgment order was subsequently vacated and an amended order entered (Pet. App. 2a).

[3]"Tr." refers to the April 21, 1978 transcript of the sentencing hearing.

distribution scheme (Tr. 13-16). At the conclusion of the sentencing hearing, the district court observed (Tr. 19):

> [W]e have considered your case very carefully. We have noted again you were on parole from a bank robbery conviction, which you have had prior involvement with the law. In this case you were clearly a dealer, but you had an opportunity and failed to cooperate with the Government.

ARGUMENT

Petitioner contends (Pet. 6-8) that the district court erred in considering his failure to cooperate with the government as a factor relevant in imposing sentence. This Court recently declined to review that same question in *United States* v. *Miller*, 589 F. 2d 1117 (1st Cir. 1978), cert. denied, No. 78-966 (Mar. 19, 1979), and there is no reason for a different result in the present case.

1. The broad range of factors that may properly be considered by the district court prior to imposing sentence was recently summarized by the Court in *United States* v. *Grayson*, 438 U.S. 41, 53 (1978):

> [I]t is proper—indeed, even necessary for the rational exercise of [sentencing] discretion—to consider the defendant's whole person and personality * * *. The "parlous" effort to appraise "character," * * * degenerates into a game of chance to the extent that a sentencing judge is deprived of relevant information concerning "every aspect of a defendant's life."

Just as the district court's belief that Grayson had perjured himself at trial was a factor relevant to his prospects for rehabilitation, so petitioner's failure (or, conversely, a defendant's willingness) to cooperate with the government could properly be considered by the district court as reflecting petitioner's attitude toward his

offense and his readiness to change his behavior. See *United States* v. *Miller, supra,* 589 F. 2d at 1139. This analysis is supported by the well-established principle that district courts enjoy broad discretion in imposing sentence, and may properly rely on all available sources of information. See *Dorszynski* v. *United States,* 418 U.S. 424 (1974). In making the punishment "fit the offender and not merely the crime" (*Williams* v. *New York,* 337 U.S. 241, 247 (1949)), the sentencing judge may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker,* 404 U.S. 443, 446 (1972); see also 18 U.S.C. 3577 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence").

The record in this case demonstrates that the prosecutor brought to the court's attention, and the court considered, the full range of factors that would reasonably bear on the appropriate length of sentence. Before imposing sentence, the district court noted that petitioner had committed a serious narcotics offense while on parole from a bank robbery conviction, and that he was a dealer, not a mere "consumer," of narcotics.[4] While cooperation with the prosecutor might have justified some degree of

[4]Although petitioner argues (Pet. 6-7) that some defendants may be forced to waive their right against self-incrimination by the district court's consideration of the defendant's "cooperative" attitude, no such issue is presented here. Petitioner voluntarily pleaded guilty long before the issue of lack of cooperation was presented to the sentencing judge. He did not take the witness stand and incriminate himself; instead, he pleaded guilty to avoid trial and obtain the benefit of a reduction of charges.

leniency, petitioner's sentence was fully supported by the severity of his crime and his prior criminal record, wholly apart from his uncooperative conduct. As Judge MacKinnon noted in his separate opinion on petition for rehearing en banc (Pet. App. 21a; emphasis in original):

> The entire record reflects that [petitioner] is a very substantial drug distributor. His sentence of 2 to 8 years is a very light sentence for a drug *distributor* with a prior conviction for bank robbery. Thus, neither the length of the sentence nor the court's statement at sentencing indicated that [petitioner] obtained an "enhanced sentence."

2. Petitioner argues that the courts of appeals are in conflict on the question presented here. We acknowledge that two cases, *United States* v. *Rogers,* 504 F. 2d 1079 (5th Cir. 1974), and *United States* v. *Ramos,* 572 F. 2d 360 (2d Cir. 1978), have held that a district court may not consider a defendant's failure to cooperate as a factor in its sentencing determination.[5] However, these holdings predate *Grayson*. In light of *Grayson's* delineation of the district court's sentencing discretion, it is reasonable to anticipate a change in the approach of these courts. Accordingly, there is no need at present to address the divergence among the lower courts. The courts of appeals that have spoken since *Grayson* (including the Fifth Circuit, which decided *Rogers, supra*) have sustained the district court's broad discretion in this area. See, in

[5]Petitioner also relies on *United States* v. *Garcia,* 544 F. 2d 681 (3d Cir. 1976). However, the court in *Garcia* vacated the defendant's sentences because the trial judge's conduct forced them to risk incriminating themselves as to other offenses in order to obtain leniency in sentencing. Here, in contrast, no question of self-incrimination is presented.

addition to the present case, *United States* v. *Miller, supra; United States* v. *Richardson,* 582 F. 2d 968, 969 (5th Cir. 1978).

Because the holding below is a correct application of this Court's decision in *Grayson*, and any disagreement in the circuits is likely to be eliminated by that decision, review of this issue is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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